No. 10-698

In The Supreme Court of the United States

NICHOLAS CODY TATE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO REVIEW A CLAIM THAT DOES NOT PRESENT A CONSTITUTIONAL QUESTION.

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

On November 15, 2005, Petitioner, Nicholas Cody Tate, entered a guilty plea to the following offenses: 1) malice murder of Chrissie Williams; 2) malice murder of Katelyn Williams; 3) kidnapping with bodily injury to Chrissie Williams; 4) kidnapping with bodily injury to Katelyn Williams; 5) conspiracy to commit armed robbery; 6) child molestation; 7) possession of a firearm during the commission of a felony; and 8) cruelty to children in the first degree.

Petitioner waived his right to a sentencing trial by a jury and Petitioner's bench trial commenced on November 28, 2005. At the conclusion of the sentencing phase on December 19, 2005, the trial court found the following statutory aggravating circumstances beyond a reasonable doubt: 1) the murder of Chrissie Williams was committed while Petitioner was engaged in the commission of the murder of Katelyn Williams; 2) the murder of Chrissie Williams was committed while Petitioner was engaged in the commission of armed robbery; 3) the murder of Chrissie Williams was committed while Petitioner was engaged in the commission of kidnapping with bodily injury; 4) the murder of Chrissie Williams was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim before death and depravity of mind; 5) the murder of Chrissie Williams was committed while Petitioner and others at his

direction engaged in the commission of the aggravated battery of Katelyn Williams; 6) the murder of Katelyn Williams was committed while Petitioner was engaged in the commission of the murder of Chrissie Williams; 7) Petitioner caused and directed Chad Tate to commit the murder of Katelyn Williams; 8) the murder of Katelyn Williams was committed while Petitioner was engaged in the commission of armed robbery; 9) the murder of Katelyn Williams was committed while Petitioner was engaged in the commission of kidnapping with bodily injury; and 10) the murder of Katelyn Williams was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim before death and depravity of mind.

After considering the evidence of statutory aggravating circumstances and mitigating facts and circumstances, the trial court sentenced Petitioner to death for the murders of Chrissie and Katelyn Williams. Additionally, Petitioner received life sentences for the kidnapping with bodily injury of both Chrissie and Katelyn Williams, ten years for conspiracy to commit armed robbery, ten years for child molestation, five years for possession of a firearm by a convicted felon, and fifteen years for cruelty to children, all sentences to be served consecutively.

Petitioner filed his motion for a new sentencing trial on January 18, 2006. However, on June 30, 2009, during a status hearing conference, Petitioner expressed his desire to waive his motion for new trial stating "you caught me red handed," "none of my

rights were violated," and "I choose to waive any and all future appeals. . . ." The trial court noted Petitioner was coherent, expressive, and very articulate. Petitioner's waiver of a motion for new trial was found to be knowingly and voluntarily made and accepted on July 7, 2009.

Petitioner filed his notice of direct appeal to the Georgia Supreme Court on August 5, 2009. The Georgia Supreme Court affirmed Petitioner's sentences and convictions on June 1, 2010. *Tate v. State*, 287 Ga. 364 (2010). Petitioner filed a writ of certiorari on November 30, 2010, and Respondent's brief in opposition follows.

II. STATEMENT OF FACTS

On December 11, 2001, Chlorice Williams, age six, Katelyn Williams, age three, and Brian Williams, age one, left their grandmother's home, where they lived, to visit their parents, Chrissie and Barry Williams. Chrissie and Barry Williams did not have full custody of the children, but had recently gained custody of the children during the day. After Chlorice was dropped off at school, Katelyn and Brian arrived at their parents' home where their father was leaving for work and their mother was still sleeping.

Later that day, after family members were unable to reach anyone at the Williams's residence, a relative drove to the Williams's home where Mrs. Williams was found handcuffed to her bed and shot in the head. In another room, Katelyn, age three, was

found on the floor drenched in her own blood. One-year-old Brian was found crying in the living room of the home.

The evidence at trial established that earlier during that same day, brothers Chad Tate, age fifteen, Dustin Tate, age eighteen, and Petitioner, age twenty-one, packed their weapons into Petitioner's truck and drove to Camp's Sporting Goods store where Dustin and Petitioner purchased ammunition, duct tape, flashlights, and extra long zippers. They also purchased ammunition for a Winchester 12 gauge rifle, a 9mm pistol, a revolver, an AR15, additional ammunition, and a knife Petitioner personally picked out. Petitioner signed for their $304.69 purchase and drove to the Williams's residence. Barry had previously sold Petitioner marijuana and methamphetamines and Petitioner was related to Chrissie by marriage. Petitioner knew, from visiting their home, that Chrissie did not work and would be at home.

When they arrived, Chad entered the home with a .380 semi-automatic gun and a Braco gun, Dustin with a Ruger 9mm and .38 Special, and Petitioner with a Smith & Wesson 9mm and .357 semi-automatic. Petitioner grabbed Katelyn, who began screaming when they entered the home, and tried to duct tape her mouth. Petitioner then forced Katelyn into her mother's room, removed her pajamas, and fondled her to become sexually aroused. When Petitioner was finished sexually assaulting her, Chad sexually assaulted Katelyn, as well.

Meanwhile, Petitioner, with Dustin's help, handcuffed Mrs. Williams to her headboard, used duct tape to secure her feet, and taped her mouth. Mrs. Williams managed, however, to remove the tape from her mouth and began screaming. Petitioner told Mrs. Williams that he'd "beat the hell out of her if she didn't shut up." Petitioner also yelled at Mrs. Williams to tell him if there were drugs in the home. Petitioner then ransacked the home looking for drugs.

Next, Petitioner ordered Chad to make Katelyn, who had begun crying and screaming again, "shut up." Petitioner cut a phone wire from the telephone in the kitchen and gave the wire to Chad, which Chad then used to strangle Katelyn. Katelyn regained consciousness and began crying again. Chad, despite having two knives on his person, reached for and took Petitioner's knife. Without any protest from Petitioner, Chad entered the bedroom, cut Katelyn's throat, and returned the knife.

In the interim, Dustin told Petitioner he could not stomach killing Mrs. Williams and exited the home. Petitioner then entered the room where Mrs. Williams was hysterical, placed a pillow over her head, jammed his Smith & Wesson 9mm into the pillow, and shot Mrs. Williams in the head. The brothers then left the Williams's residence in Petitioner's truck and Petitioner drove to Mississippi.

In Mississippi, Petitioner kidnapped a convenient store worker, Angie Rowzee, at gunpoint and forced her to drive them for several hours. Petitioner later

purchased a hotel room and at gunpoint forced Ms. Rowzee into his room. Petitioner's brothers rented their own hotel room. The next morning, the men left the hotel and Dustin suggested releasing Ms. Rowzee. Petitioner drove Ms. Rowzee to a highway ramp beside a rest area and ordered her out of the car. Petitioner stated he would shoot her if she drew any attention to them.

Meanwhile, an employee at the New Hope Child Care Center, which was located next door to the victims' home in Georgia, reported seeing Petitioner's truck leave the victims' residence after the murders. This led Special Agent Christopher Beanland with the Federal Bureau of Investigation (FBI) to contact Petitioner's parents, Oswald and Debra Tate, and suggest that if their sons made contact to encourage them to surrender. Eventually, the Petitioner was convinced to turn himself and his brothers into authorities.

After the brothers were taken into custody in Oklahoma, a search of their hotel rooms where they stayed in Mississippi revealed drugs, weapons, ammunition, and a police scanner. In their family bedrooms, where each resided in Dallas, Georgia, officers found as many as 44 weapons including guns, knives, swords, a grenade and bladed knuckle. The majority of the weapons were retrieved from Petitioner's bedroom.

Subsequently, the autopsy report confirmed that Katelyn suffered a cut wound across the front of her

neck that measured approximately five inches in length. The knife wound punctured Katelyn's internal jugular vein, cut the entire length and depth of her trachea, and cut her windpipe. It was determined that it could have taken up to fifteen minutes, depending on the rate of blood loss, for the wounds to have killed Katelyn.

Katelyn's body also had petechia, pin-point-sized hemorrhages, on her face, eyes, mouth and neck, which are indicative of ligature strangulation. Although the strangulation may have played a minor role in the causation of death, the wound to the neck was likely the primary cause of death. In addition, there were other minor injuries on the body including bruising on Katelyn's hip.

The autopsy report also confirmed that Mrs. Williams died from a gunshot wound to the head. There was also extensive bruising on her right and left forearms and wrists. It was determined that she could have survived up to a few minutes after receiving the gunshot wound.

DNA tests were conducted on three pairs of blue jeans belonging to Petitioner and his brothers. Petitioner's blue jeans tested positive for Katelyn's blood.

III. DENIAL OF SPECIFIC "FACTS" SET OUT IN PETITION

Contrary to Petitioner's attempt to portray Dustin as the ring-leader of the double murders, the

record establishes that Petitioner was the link to the victims, owned the bulk of the weapons used at the crime scene and provided the knife used to stab Katelyn. Additionally, Petitioner, alone, murdered Mrs. Williams, drove to and away from the crime scene, and kidnapped Ms. Rowzee at gunpoint.

Although Petitioner states that if not for Dustin Tate, "the brothers would not have gone to the Williams's residence in the first place," (Petition, p. 20), Petitioner, not his brothers, suggested breaking into the Williams's residence. Petitioner knew the family and knew Mrs. Williams would be home without her husband. Furthermore, according to Petitioner's own statements to authorities, which were introduced at trial by Petitioner, he and Dustin both planned to rape Mrs. Williams, and all three brothers intended to steal money, drugs, and weapons from the home.

Furthermore, Petitioner's description of the weapons brought to the crime scene undermines his claim concerning his role in the crime. Petitioner states that "among other weapons, Dustin brought along a taser gun," (Petition, p. 4), but fails to fully inform this Court that the majority of weapons brought from the Tate residence to the crime scene belonged to Petitioner. Moreover, the record shows that Petitioner decided to stop at a local hunting store in route to the Williams's residence to purchase more weapons, including the knife used to kill Katelyn.

Also establishing Petitioner's leadership role in the crimes is the evidence that showed that, upon arriving at the home, Petitioner continued to direct the events by ordering his brothers to look for drugs stating, "I told them [ ] look for crank." Petitioner then grabbed Katelyn and tried to restrain her with duct tape. Further, the record also shows that it was also Petitioner, rather than his brothers, who yelled at Mrs. Williams to reveal if drugs were in the home.

Moreover, Petitioner actively participated in Katelyn's murder. After failing to quiet Katelyn, Petitioner ordered Chad to "take her in the back bedroom" and make her be quiet. Petitioner, ***not Chad*** as Petitioner suggests (Petition, p. 5), then cut the phone cord used to strangle Katelyn and provided the knife used to slit Katelyn's throat.

Significantly, after Dustin said he could not stomach continuing the crime and left the home, Petitioner placed a pillow over Mrs. Williams's head and shot her in the head while she lay screaming "What are you doing to my children? Are my children okay?"

Furthermore, following the murders, Petitioner drove the getaway car to Mississippi where he, rather than his brothers, picked Ms. Rowzee to kidnap calling her "his project." Although Petitioner paints himself as the protector of Ms. Rowzee, (Petition, p. 5), Petitioner alone held Ms. Rowzee at gunpoint throughout her kidnapping and forced her into his

hotel room. Petitioner told Ms. Rowzee that he had killed a mother and child in Georgia, that he was the brother in charge of the crime spree, and that he would kill again if she tried to escape.

Moreover, it was Dustin's idea, rather than Petitioner's idea, to release Ms. Rowzee. Even though Petitioner boasted that he left Ms. Rowzee unharmed, when he released Ms. Rowzee, Petitioner threatened to kill her if she drew attention to them.

In addition to supplying the majority of the weapons, committing most of the crimes, and directing his brothers to commit additional crimes, Petitioner was also the oldest perpetrator. The record showed Petitioner as the leader.

Petitioner also implies in his brief that he did not molest Katelyn; however, the record shows that Petitioner pled guilty to the offense and stated, "I am the one that took [Katelyn] into the room with the intent on looking at her to get sexually aroused." Also, in his interview with officers, Petitioner explained that at first, Chad "had his fun" with three-year-old Katelyn, but then Petitioner "felt like [he] was being left out" and went in the bedroom and also "played" with Katelyn. As found by the Georgia Supreme Court, "The strongest portion of the factual basis for Tate's guilty plea to child molestation was his own statement in the plea hearing that he himself had undressed Katelyn Williams for the purpose of his sexual arousal." *Tate v. State*, 287 Ga. at 366. Thus,

Petitioner has continuously reported that he molested Katelyn.

Further, contrary to Petitioner's assertion that Dustin acted alone in restraining Mrs. Williams, (Petition, p. 5), Petitioner confessed, "I did tape her up." As found by the Georgia Supreme Court, "Both Nicholas Tate and Chad Tate assisted Dustin Tate either in taping Chrissie Williams's mouth and eyes with the duct tape or in handcuffing her hands to the headboard and taping her legs to the footboard of the bed. Nicholas Tate threatened to beat Chrissie Williams with his handgun if she did not abandon her attempts at screaming." *Tate v. State*, 287 Ga. at 369.

Also, in direct opposition to Petitioner's claim that the gun accidently went off when he killed Mrs. Williams, (Petition, p. 6), the evidence showed that the weapon could not have been accidently fired.

Petitioner also attempts to undermine his role in the crimes by stating that he was under the influence of drugs when the murders were committed. (Petition, p. 6). During the guilty plea proceedings, Petitioner stated "I was high, but I don't believe it – it had any bearing on my right from wrong judgment enough to – I feel that's been used as a crutch, and it will not be used as a crutch in my plea agreement."

Petitioner asserts that police failed to inform him that an attorney, Jimmy Berry, had been hired to represent him and attempted to reach Petitioner after he was arrested. (Petition, p. 6). The record indicates, however, that Mr. Berry never represented Petitioner

and that Petitioner never informed officers he was represented by Mr. Berry or any other counsel.

Furthermore, Petitioner portrays himself as the victim and as being remorseful. (Petition, p. 20). However, during the trial, the State put on the record that Petitioner was "having a great time. He's laughing. He's cutting up. Even while they're talking about the slitting of the throat of a three-year old, he's sitting over there without a care in the world."

Additionally, Petitioner's statement that he was subjected to "repeated childhood sexual abuse by his older brother who was ultimately sentenced to five years in prison for rape, incest, and child molestation," (Petition, p. 20), is misleading. While Petitioner's older brother, Curtis Tate, was sentenced to one count of child molestation for touching Petitioner inappropriately, Curtis's rape and incest charges stemmed from a crime not committed on Petitioner. (*See* Defendant's Exhibit 17).

Respondent is not aware of the facts surrounding Petitioner's alleged hospitalization for depression, as the citation to Sentencing Defense Exhibit 17 provided in Petitioner's Petition does not reference the hospitalization. (Petition, p. 20).

IV. REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S PROPORTIONALITY CLAIM IS NOT PROPERLY BEFORE THIS COURT AS IT FAILS TO PRESENT A CONSTITUTIONAL QUESTION FOR THIS COURT'S REVIEW.

Petitioner claims that this Court should grant certiorari review as the Georgia Supreme Court's proportionality review does not comply with this Court's holding in *Gregg v. Georgia*, 428 U.S. 153 (1976), as it does not compare the facts of Petitioner's case and Petitioner's sentences to all similar cases in which the death penalty was imposed, those cases in which it was not imposed, and in those cases in which the death penalty was not sought. However, as Petitioner's claim does not present a constitutional question, this Court should deny certiorari review.

This Court in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), held that comparative proportionality review is not required by the Eighth Amendment. Thus, as no constitutional claim has been raised, there is nothing for this Court to review and the petition should be denied.

Petitioner attempts to circumvent the lack of a constitutional claim by asserting that this Court's approval of Georgia's statutory death penalty scheme rests almost entirely upon its sentence review. However, the fact that Georgia's death penalty statute requires the Georgia Supreme Court to conduct a comparative proportionality review was only ***one*** of

the factors that this Court noted when approving Georgia's death penalty statute after *Furman v. Georgia*, 408 U.S. 238 (1972). *See Gregg v. Georgia*, 428 U.S. at 206.

The concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. "Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish." *Id.* at 206. Under *Gregg*, the Court discussed the need for a bifurcated proceeding in order to ensure evidence that would not be admissible during the guilt/innocence phase but is entirely relevant to sentence could be heard by the sentencing authority. *See generally id.* at 190-192. Another important factor discussed was the sentencing instructions given to the jury to help guide their decisions. The Court explained that these two issues were the main concern of *Furman*:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the

> imposition of sentence and provided with standards to guide its use of the information.

Id. at 195.

The Court held that Georgia's new statutory scheme "narrow[ed] the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt,' thereby enabling "the jury to consider the circumstances of the crime and criminal before it recommends sentence" which was the very problem with the *Furman* jury. *Id.* at 196-198. The Court went on to explain that, "As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application.' *Coley v. State*, 231 Ga. 829, 834, 204 S.E. 2d 612, 615 (1974)." *Id.* at 197-198. Consequently, the decision in *Gregg* reinstating the death sentence did not center upon the statutory sentence review performed by the Georgia Supreme Court.

Moreover, on direct appeal in this case, the Georgia Supreme Court clearly noted the statutory aggravating circumstances and the specific facts of Petitioner's case in addition to Petitioner's specific role in the crimes and held:

> Under Georgia statutory law, this Court must review the evidence in every case in which the death penalty has been imposed and address three statutory questions. *See*

OCGA § 17-10-35(c). Therefore, we summarize the evidence presented in Tate's sentencing trial in more detail below. The evidence presented in Tate's sentencing trial, including his videotaped interrogation, showed that he and two of his brothers, Dustin Tate and Chad Tate, purchased ammunition, duct tape, and knives at a local sporting goods store and formulated a plan to burglarize the home of Chrissie Williams, to steal drugs and money from her home, and to rape her. When they arrived at the home, Katelyn Williams, Chrissie Williams's three-year-old daughter, answered the door. Dustin Tate shocked Chrissie Williams with a stun gun, believing it would render her unconscious. When his attempt to render her unconscious failed, Dustin Tate forced Chrissie Williams from the room where she had been sleeping and where her infant son was screaming to the room across the hallway. Both Nicholas Tate and Chad Tate assisted Dustin Tate either in taping Chrissie Williams's mouth and eyes with the duct tape or in handcuffing her hands to the headboard and taping her legs to the footboard of the bed. Nicholas Tate threatened to beat Chrissie Williams with his handgun if she did not abandon her attempts at screaming. Nicholas Tate rummaged through the home and through Chrissie Williams's purse looking for drugs and money. Chad Tate and Nicholas Tate undressed Katelyn Williams for their sexual gratification. When Katelyn Williams would not stop screaming, Nicholas Tate directed

> Chad Tate to silence her. After Chad Tate's attempt to murder her by strangling her failed, Nicholas Tate allowed Chad Tate to take his knife. Chad Tate slit Katelyn Williams's throat several times and then pushed her off of the bed onto the floor, where she eventually bled to death. Dustin Tate left the house out of fear. Nicholas Tate then placed a seat cushion over Chrissie Williams's head as she lay bound to a bed, and he fired one shot through her head, killing her. After killing the two victims in Georgia, the three brothers fled the state, kidnapped a woman and stole her vehicle in Mississippi, and finally surrendered to authorities in Oklahoma.

Tate v. State, 287 Ga. at 369. The Georgia Supreme Court found that the evidence was sufficient to authorize a "rational trier of fact" to find the statutory aggravating circumstances beyond a reasonable doubt. *Id.*, *citing*, *Ring v. Arizona*, 536 U.S. 584 (2002); *Jackson v. Virginia*, 443 U.S. 307 (1979).

The Georgia Supreme Court then found, in light of their review of the record that Petitioner's sentences of death "were not imposed under the influence of passion, prejudice, or any other arbitrary factor." *Tate v. State*, 287 Ga. at 370.

Finally, after finding the evidence supported the statutory aggravators and that the sentences of death

were not imposed based on any arbitrary factor, the Georgia Supreme Court concluded:

> Considering both the crimes and the defendant, we conclude that the death sentences in Tate's case are not disproportionate punishment within the meaning of Georgia law and are not unconstitutional. *See* OCGA § 17-10-35(c)(3); *Gissendaner v. State*, 272 Ga. 704(19)(a) (532 SE2d 677) (2000) (stating that this Court's statutorily-mandated proportionality review concerns whether a particular death sentence "is excessive per se" or is "substantially out of line" for the type of crime involved and concluding that this Court's proportionality review is not deficient under constitutional standards). The cases appearing in the Appendix support our conclusion in that they show that a significant number of juries have been willing to impose death sentences in cases where a defendant has murdered more than one person and where, as in this case, there was no evidence of arbitrariness or other improper influences. We note Tate's argument that his death sentences are disproportionate punishment in light of the fact that neither of his co-defendants have received death sentences. *See Gissendaner*, 272 Ga. at 717(19)(a) (noting that this Court's proportionality review includes an examination of the sentences received by any co-defendants). The evidence in Tate's sentencing trial showed that one co-defendant, Chad Tate, was merely fifteen years old at the time of the murders and,

> accordingly, that he was ineligible for the death penalty. *See Roper v. Simmons*, 543 U.S. 551 (125 SCt 1183, 161 LE2d 1) (2005); *Walker v. State*, 282 Ga. 774(14) (653 SE2d 439) (2007) (noting in a proportionality review that the co-defendant was ineligible for a death sentence based on his having been adjudicated as being mentally retarded). The evidence in Tate's sentencing trial also showed that the second co-defendant, Dustin Tate, was neither the actual killer nor the primary driving force in the decision to kill the victims. Accordingly, we conclude that Nicholas Tate's death sentences are not excessive per se or substantially out of line, even in light of the fact that Dustin Tate, the only other adult present during the murders, has received a sentence less than death. *Gissendaner*, 272 Ga. at 718(19)(b) (weighing the relative culpabilities of co-defendants who each could reasonably have been argued to be more culpable than the other and finding no unlawful disproportionality).

Tate v. Georgia, 287 Ga. at 370.

There is no issue warranting review by this Court. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

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